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## Torts: Torts and Gun Control: Sealing Up the Cracks and Helping Licensed Dealers Avoid Sales to Unqualified Buyers

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# Torts: Torts and Gun Control: Sealing Up the Cracks and Helping Licensed Dealers Avoid Sales to Unqualified Buyers\*

## *I. The Story of a Gun Buyer, His Victims, and the Dealer*

As three dozen of Nicholas' classmates watched, huddled in terror, the youth pastor at Atlantic Shores Christian School in Virginia screamed at Nicholas, "What in the world would make you want to do something like this?"<sup>1</sup> The barely sixteen-year-old boy named Nicholas had brought a semi-automatic handgun to school in his backpack.<sup>2</sup> As the pastor tackled Nicholas and felt a bullet breeze dangerously close to his head, Nicholas replied, "They hate me."<sup>3</sup>

No doubt, actress Rebecca Schaeffer, of television's *My Sister Sam*, asked the same question Nicholas' pastor asked when she faced the stalker who murdered her.<sup>4</sup> No doubt, E.C. Penley, a seventy-year-old man who entered a discount department store to buy Freon and became a hostage held at gunpoint<sup>5</sup> wanted an answer as well.

Nicholas' story conveys the problem perfectly and poignantly all by itself. Perhaps Nicholas' pastor should have asked, "How in the world did you get that weapon?" The answer might have shocked the pastor. How does a fifteen-year-old obtain a Cobray M-11/9 at a price of \$300 from a federally licensed dealer?<sup>6</sup> Much too easily.

Nicholas pestered a second cousin into taking him to Guns Unlimited, a store Nicholas asked for by name.<sup>7</sup> At Guns Unlimited, Nicholas interacted with the salesman, asking to see particular guns and asking about muzzle velocity and comparative power.<sup>8</sup> Nicholas' cousin left him with the salesman and wandered around the store alone as the other two became increasingly involved in their conversation.<sup>9</sup>

Shortly thereafter, and in plain view of the salesman, Nicholas passed \$300 in

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\* This comment is dedicated to the memory of our classmate, Ward Fuller, who would have unquestioningly agreed with nothing in this text but the statement that it is the children who grow up in the grip of America's gun culture who require our greatest attention.

His untimely passing broke many hearts, but only those who had the misfortune of never knowing him should mourn his death uncomforted by the joyous memory of his life.

1. Erik Larson, *The Story of a Gun*, ATLANTIC, Jan. 1993, at 48, 75, 78.

2. *Id.* at 75.

3. *Id.* at 78.

4. *Id.*

5. *Howard Brothers v. Penley*, 492 So. 2d 965, 966 (Miss. 1986).

6. Larson, *supra* note 1, at 60.

7. *Id.* at 57.

8. *Id.* at 60.

9. *Id.*

cash to his cousin. The cousin then purchased the semi-automatic Cobray 9, a gun derivative of one designed for Latin American guerrillas.<sup>10</sup> In practical terms, the significance of this design amounts to low cost, easy concealment, and a propensity for "mow-'em-down military use."<sup>11</sup>

Nicholas' cousin filled out the federally required purchaser form, Form 4473.<sup>12</sup> The salesman, a firefighter and former police officer, told the cousin that all questions on the form should be answered "no."<sup>13</sup> Form 4473 acts as the basic enforcement tool of the federal Gun Control Act's<sup>14</sup> limits on gun purchases. As the cousin completed the form and the sale, Nicholas removed the gun from the sale<sup>15</sup> counter. When Nicholas and his cousin left Guns Unlimited, fifteen-year-old Nicholas carried the gun.<sup>16</sup> Interestingly enough, the federal Gun Control Act prohibits gun sales to persons under twenty-one years of age.<sup>17</sup>

Nicholas' possession of this gun led to the death of schoolteacher Karen Farley.<sup>18</sup> Police found her body an hour and a half after the pastor's apprehension of Nicholas.<sup>19</sup> Nicholas sent bullets through her forearm and torso.<sup>20</sup> After she had fallen to the ground, Nicholas continued to fire upon her.<sup>21</sup>

Karen Farley's children, Will and Lora, had been herded into an auditorium with their Atlantic Shores classmates that morning.<sup>22</sup> Word quickly traveled about the shooting of teacher Sam Marino, who survived despite the two nine-millimeter bullets that struck him.<sup>23</sup> However, the news of their mother's death reached Will and Lora much later.<sup>24</sup> The more their father learned about the events of that day, the more he felt the need to actively seek restitution for those events. Consequently, he filed a \$13 million lawsuit against Guns Unlimited.<sup>25</sup> A jury awarded him and his children \$105,000,<sup>26</sup> but the family still awaits a final decision on the case due to appeals.<sup>27</sup>

The events of December 16, 1988, left Nicholas in jail, facing a life sentence.<sup>28</sup> Those events also left Will and Lora Farley and their father with the pain of Karen

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10. *Id.* at 51.

11. *Id.* at 52.

12. *Id.* at 60.

13. *Id.*

14. 18 U.S.C. §§ 921-928 (1994).

15. Larson, *supra* note 1, at 60.

16. *Id.*

17. 18 U.S.C. § 922 (A)(8)(b)(1) (1994).

18. Larson, *supra* note 1, at 78.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 75, 78.

24. *Id.*

25. Elizabeth Wasserman, *Gun Store Sued for \$10 Million in Slaying*, *NEWSDAY*, Feb. 9, 1993, at 6.

26. Larson, *supra* note 1, at 78.

27. Wasserman, *supra* note 25, at 6.

28. Larson, *supra* note 1, at 78.

Farley's senseless death. A year after the school shootings, Guns Unlimited boasted a third location.<sup>29</sup> The newest Guns Unlimited popped up right across the street from Atlantic Shores Christian School.<sup>30</sup>

While some may dismiss Nicholas' story as an isolated incident, there is nothing novel about lawsuits such as the one Karen Farley's husband filed — except, perhaps, their growing number. Survivors of victims like Karen Farley have increasingly turned to tort liability after becoming frustrated with the gun control legislation that failed to protect their families.<sup>31</sup> However, current case law provides few real guidelines for survivors who want to sue or gun dealers who want to avoid liability.

## II. Federal and State Gun Control Legislation

Federal gun control legislation has been enacted in the form of the Federal Gun Control Act of 1968 (Gun Control Act) and the 1993 Brady Handgun Violence Prevention Act. The Gun Control Act forbids sales to minors, convicted felons, and the mentally incompetent.<sup>32</sup> The Brady Act hits buyers with a five-day waiting period and provides for a limited background check.<sup>33</sup> Each state adds to this federal legislation its own parallel or supplemental laws.<sup>34</sup> Furthermore, local ordinances may place even stricter limitations on gun sales.<sup>35</sup> Despite all this regulation of gun sales, however, gun violence has hardly subsided. Consequently, the victims of violence have increasingly turned to private causes of action for restitution.

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29. *Id.*

30. *Id.*

31. Similar stories appear among recently filed suits. A New York police officer's widow filed a \$10 million lawsuit against the sporting goods store that sold a Cuban immigrant with "known criminal tendencies" a shotgun. Wasserman, *supra* note 25, at 6. The shotgun buyer killed the police officer and two other victims at a restaurant in 1991. *Id.* A Pennsylvania court recently upheld a Philadelphia jury's more than \$11 million award to a 14-year-old girl who remained brain dead after a shooting accident. *Id.* The Philadelphia jury determined that the gun shop failed to provide the girl's neighbor with adequate loading instructions. *Id.* A Florida jury has awarded \$12.5 million to a woman whose ex-boyfriend shot her at point-blank range, leaving her a quadriplegic. Frederic M. Biddle, *Wal-Mart to Stop Sales of Handguns*, BOSTON GLOBE, Dec. 23, 1993, at 1. When the boyfriend purchased the gun at K-Mart, he allegedly was too drunk to fill out the required forms. *Id.* The K-Mart clerk filled out the forms for him and completed the sale. *Id.* In Texas, survivors of a slain couple sued Wal-Mart for selling a handgun to a man who admitted he suffered from mental problems. Michael Arena, *Wal-Mart Hangs Up its Pistols; Stores Won't Stock Handguns but Will Sell Rifles, Shotguns*, NEWSDAY, Dec. 23, 1993, at 33. The buyer used the gun to kill his parents. *Id.* Finally, the survivors of victims of a 1993 shooting rampage at a San Francisco law firm filed suit in 1994 against gun manufacturers and the Las Vegas store where the gun was purchased. Maure DeLan, *Relatives of Victims Sue Gun Makers*, L.A. TIMES, May 19, 1994, at 3. This sampling of suits, furthermore, is far from complete.

32. 18 U.S.C. § 922(d) (1994).

33. *Id.* § 921.

34. Suzanne Sumpter, *Buczkowski v. McKay: A Proper Case for Gun Dealer Liability?*, GEO. MASON INDEP. L. REV. 127 (1992).

35. *Id.*

### *III. The U.S. Supreme Court and the Federal Gun Control Act*

The federal Gun Control Act includes among its provisions a prohibition against sales to minors, felons, and the mentally incompetent.<sup>36</sup> In the mid-1970s, the United States Supreme Court took advantage of its opportunities to interpret the Act. When faced with statutory interpretation and concerns about the scope of Congress' commerce power, the Court willingly explored the Act's history.

In *Huddleston v. United States*, the Court referred to Treasury Form 4473 as an "enforcement tool."<sup>37</sup> The Court further noted that Congress intended to make firearms purchases to certain persons more difficult in an effort to reduce crime.<sup>38</sup> The persons to whom purchases were forbidden were those whose possession of firearms contravened the public interest because of their "age, criminal background, or incompetency."<sup>39</sup> Thus, the Court concluded that the Act's intended effect was a restriction on the public's access to weapons.<sup>40</sup> Furthermore, the Court stated that the "principal agent of federal enforcement is the [federally licensed] dealer."<sup>41</sup>

The Court relied on congressional documentation concerning the Act in finding that "[i]nformation drawn from records kept by dealers was a prime guarantee of the Act's effectiveness in keeping 'these lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger for us to allow.'"<sup>42</sup>

The Court continued:

[T]he focus of the federal scheme is the federally licensed firearms dealer, at least insofar as the Act directly controls access to weapons by users. Firearms are channeled through dealers to eliminate the mail order and the generally widespread commerce in them, and to insure that, in the course of sales . . . by these dealers, weapons could not be obtained by individuals whose possession of them would be contrary to the public interest.<sup>43</sup>

The Court concluded that no doubt existed concerning Congress' intent to keep weapons from juveniles, criminals, and mental incompetents.<sup>44</sup> Congress, the Court said, meant no inconvenience to hunters and sportsmen but clearly wanted to do its best to keep weapons from those it considered dangerous.<sup>45</sup> In conclusion, the Court noted that "Congress unquestionably made it unlawful for dealers . . . 'to sell . . . any firearm' . . . to a convicted felon, a juvenile, a drug

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36. 18 U.S.C. § 922(d) (1994).

37. *Huddleston v. United States*, 415 U.S. 814, 816 (1974).

38. *Id.* at 824.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 825.

43. *Id.*

44. *Id.* at 827.

45. *Id.* at 827-28.

addict, or a mental defective."<sup>46</sup> Furthermore, two years later the Court reiterated these same points in *Barrett v. United States*.<sup>47</sup>

#### IV. Approaches to Tort Liability

##### A. Negligence Per Se

Some courts accept a negligence per se approach to liability, using the federal Gun Control Act and local statutes as a foundation.<sup>48</sup> For example, in *West v. Mache of Cochran*, a Georgia appellate court found the dealer negligent per se<sup>49</sup> for selling a semi-automatic rifle and bullets to a man who had spent eleven years in a mental institution for brutally raping an elderly woman.<sup>50</sup> The rifle purchaser could not read or write,<sup>51</sup> and he did not have a driver's license.<sup>52</sup> Consequently, he failed to qualify as a competent gun buyer under the Gun Control Act.<sup>53</sup> The Act forbids sales to mental incompetents, requires the purchaser to fill out a Form 4473, and requires the presentation of proper identification.<sup>54</sup>

The Court of Appeals of Georgia concluded that the seller knew the sale violated the law and knew or should have known the sale created danger for residents in the community.<sup>55</sup> In order to complete the sale, the seller allowed the purchaser's estranged wife to fill out the necessary form.<sup>56</sup> The buyer brought his wife to the store only after the seller refused to complete a sale without identification or a completed federal form.<sup>57</sup> Once the wife presented her driver's license and indicated on the form that she had not been adjudicated mentally defective or committed to a mental institution, the sale was completed.<sup>58</sup>

Her husband made the payment. He marked the layaway form to indicate delivery of the rifle.<sup>59</sup> He bought two packs of bullets, and he received instructions on how to break down and put back together the gun.<sup>60</sup> Furthermore, the sales clerk handed him the gun.<sup>61</sup> Three weeks after this sale, he fired the gun through the window of Donna West's home.<sup>62</sup> A bullet entered her head, and she died.<sup>63</sup>

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46. *Id.* at 832.

47. 423 U.S. 212 (1976).

48. 18 U.S.C. §§ 921-928 (1994).

49. *West v. Mache of Cochran, Inc.*, 370 S.E.2d 169, 172 (Ga. Ct. App. 1988).

50. *Id.* at 170.

51. *Id.*

52. *Id.*

53. 18 U.S.C. §§ 921-928 (1994).

54. *Id.* § 922(d).

55. *West*, 370 S.E.2d at 170.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

Donna West's husband subsequently brought a tort action against the seller on behalf of himself and the couple's two minor children.<sup>64</sup> Contrary to the trial court's approach, the appellate court recognized the violation of the Gun Control Act as negligence per se when that violation resulted in injury.<sup>65</sup>

The court in *West* implemented the standard test in negligence per se cases.<sup>66</sup> The court first inquired whether the victim fell within the class of persons the legislation intended to protect.<sup>67</sup> The court then asked whether the harm fit the type the legislation intended to prevent.<sup>68</sup>

The sale, the *West* court consequently determined, created negligence per se liability partly because Donna West fell within the class of persons the Act attempted to protect.<sup>69</sup> After all, Donna West became the victim of a mental incompetent who possessed a gun.<sup>70</sup> Furthermore, her harm fit the nature of the harm the Act intended to prevent — being shot by a mental incompetent.<sup>71</sup> The court in *West* noted that the gun purchaser did not possess the identification required by regulations<sup>72</sup> issued under the Act for a legal purchase.<sup>73</sup> Thus, the violation of the law resulted in the purchaser's possession of the gun, which ultimately resulted in Donna West's death.<sup>74</sup>

Similarly, a court of appeals in Florida applied negligence per se to a case in which the sale resulted in suicide.<sup>75</sup> In *Sogo v. Garcia's National Gun, Inc.*, the Florida court applied this theory of liability to a sale that violated a county ordinance requiring a three day waiting period before delivery of a purchased weapon.<sup>76</sup> Only hours after the sale, the buyer committed suicide by shooting himself in the head.<sup>77</sup>

When the buyer's mother filed suit, a Florida trial court dismissed her complaint.<sup>78</sup> However, the appellate court reversed.<sup>79</sup> The appellate court held that the statutory "cooling off" period attempted to interrupt an impulsive plan to buy and use a gun.<sup>80</sup> More importantly, the court interpreted the waiting period as intended to prevent harm to buyers who planned to shoot others or themselves.<sup>81</sup> Thus, the

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64. *Id.* at 169.

65. *Id.* at 171.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 172.

74. *Id.*

75. *Sogo v. Garcia's Nat'l Gun, Inc.*, 615 So. 2d 184 (Fla. Dist. Ct. App. 1993).

76. *Id.* at 185.

77. *Id.*

78. *Id.*

79. *Id.* at 186.

80. *Id.*

81. *Id.*

purchaser who committed suicide fell within the class the ordinance tried to protect simply because no textual basis existed for the exclusion of suicides.<sup>82</sup> Although this Florida court easily found the purchaser and the harm within the classes the ordinance attempted to protect, it left the more complicated question of causation undecided.<sup>83</sup>

Large retail sellers have hardly escaped the liability that a negligence per se approach can quickly create. For example, K-Mart failed to sway the jury its way in a Florida suit filed by a police officer who sustained a gunshot wound to the head and "devastating personal injuries."<sup>84</sup> In *K-Mart Enterprises of Florida, Inc. v. Keller*, the officer sued based on a sale in violation of the federal Gun Control Act.<sup>85</sup>

In *Keller*, a K-Mart clerk sold a rifle to a customer but failed to ask the questions on the required Firearms Transaction Record Form 4473.<sup>86</sup> Form 4473 questions refer to the restrictions placed on gun sales by the Gun Control Act.<sup>87</sup> The Act expressly forbids knowing or unreasonable sales to indicted or convicted felons and persons who use illegal drugs.<sup>88</sup>

Consequently, two questions on the form directly ask whether the buyer faces felony charges or unlawfully uses drugs.<sup>89</sup> The K-Mart clerk simply marked the questions with a "no."<sup>90</sup> The buyer testified that he would have answered the questions truthfully, if only he had been asked.<sup>91</sup> In fact, the buyer had been the subject of a felony information and used marijuana.<sup>92</sup>

Six weeks later, the buyer loaned the gun and some ammunition to his brother.<sup>93</sup> The buyer knew his brother abused drugs and alcohol.<sup>94</sup> He also knew his brother was "outright drunk at the time."<sup>95</sup> The brother proceeded to take his sister and her child hostage with the rifle purchased at K-Mart.<sup>96</sup> This hostage situation arose only after the brother fired two harmless shots through his ex-wife's window.<sup>97</sup> Once police arrived upon the hostage scene, the shots ceased being harmless.<sup>98</sup> The

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82. *Id.*

83. *Id.* at 187.

84. *K-Mart Enters. of Fla. v. Keller*, 439 So. 2d 283, 285 (Fla. Dist. Ct. App. 1983).

85. *Id.* at 284.

86. *Id.*

87. *Id.*

88. 18 U.S.C. § 922(d) (1994).

89. *K-Mart*, 439 So. 2d at 284.

90. *Id.* at 285.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*



brother took three more shots.<sup>99</sup> One of those bullets struck the plaintiff officer in the head.<sup>100</sup>

K-Mart did not bother to argue that it had not been negligent per se.<sup>101</sup> Nevertheless, the battle over liability continued. For K-Mart opted, albeit unsuccessfully, to argue that the purchaser's and his brother's actions constituted unforeseeable intervening causes of the officer's injuries.<sup>102</sup>

Sears, like K-Mart and Wal-Mart, has faced liability charges under a negligence per se theory. These large retail stores, with their uninformed and often poorly paid sales clerks, find themselves especially prone to negligent sales and lawsuits.

In *Hetherton v. Sears, Roebuck & Co.*, a police officer sued the retail store after suffering a gunshot wound to the head during an attempted restaurant robbery.<sup>103</sup> When the officer filed suit, his head still held thirteen ammunition fragments.<sup>104</sup> Six weeks prior to the shooting, the robber purchased the rifle and ammunition at Sears in a transaction that violated the federal Gun Control Act and Delaware law.<sup>105</sup>

The buyer in *Hetherton* carried three felony convictions, including a previous attempted robbery conviction.<sup>106</sup> These convictions made the buyer ineligible to purchase the rifle or ammunition under federal and Delaware laws.<sup>107</sup> Furthermore, he did not have the identification required by law for a proper purchase.<sup>108</sup> This buyer, without the seller's knowledge, falsely indicated on the Form 4473 that he had no felony convictions.<sup>109</sup> However, the seller knowingly allowed the purchase without proper identification.<sup>110</sup>

Applying the negligence per se theory, the United States Court of Appeals for the Third Circuit initially asked whether the law focused on "the safety of others."<sup>111</sup> Further analysis, true to the accepted negligence per se approach,<sup>112</sup> referred to the type of injuries the laws attempted to prevent.<sup>113</sup> The court found it "incomprehensible" that laws regulating dealers of deadly weapons could have been enacted for any other reason than to keep innocent persons safe from harm caused by the use

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Hetherton v. Sears, Roebuck & Co.*, 593 F.2d 526, 527 (3rd Cir. 1979).

104. *Id.* at 527.

105. *Id.* at 527-28.

106. *Id.* at 527.

107. *Id.*

108. *Id.*

109. *Id.* at 527-28.

110. *Id.* at 527.

111. *Id.* at 529.

112. *Id.*

113. *Id.* at 530.

of deadly weapons.<sup>114</sup> Sears then clearly became negligent per se for knowingly allowing a sale without proper identification as required by federal and state law.<sup>115</sup>

Still, questions remained as to liability for the unknowing sale to a criminal and as to proximate cause. While the court avoided the unknown criminal convictions because it found a knowing violation of the law that created negligence per se, it could not escape a proximate cause analysis.<sup>116</sup> Thus, the importance of proximate cause quickly and strikingly becomes apparent in these cases. The importance of negligence per se, however, rests in its creation of the prerequisite duty that a proximate cause analysis presupposes.<sup>117</sup>

### *B. Common Law Duty*

When the initial tort question of a duty arises, jurisdictions that recognize negligence per se often have to look no further for a standard than to the Gun Control Act and its local counterparts.<sup>118</sup> However, some jurisdictions do not recognize negligence per se. Still, these jurisdictions look to the Gun Control Act to determine what duties it might imply for dealers. With the complicated questions of common law duty and causation, the cases leave behind the certainties of the negligence per se analyses and its creation of a generally recognized duty to comply with gun control laws.<sup>119</sup>

#### *1. Duty to Observe Customers*

Louisiana's repudiation of the negligence per se doctrine creates the necessity of analyzing the duty question without relying on gun control legislation for a standard of behavior.<sup>120</sup> In *Phillips v. K-Mart Corp.*, a Louisiana court of appeals noted that statutes could only serve as factors in a duty-risk analysis in that state.<sup>121</sup> Violation of a statute alone could not create tort liability.<sup>122</sup>

In *Phillips*, K-Mart allowed a nineteen-year-old to buy a box of .357 Magnum ammunition.<sup>123</sup> The federal Gun Control Act does not allow the sale of ammunition for firearms other than shotguns or rifles to persons known or reasonably believed to be under twenty-one.<sup>124</sup> However, without a negligence per se doctrine in place, the court entertained "serious doubt" about K-Mart's duty to the buyer's deceased victim to comply with the Act's age requirement.<sup>125</sup> The court skirted the

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. See *supra* notes 48-117 and accompanying text.

120. *Phillips v. K-Mart Corp.*, 588 So. 2d 142, 143 (La. Ct. App. 1991).

121. *Id.* at 143, 144.

122. *Id.* at 143.

123. *Id.*

124. 18 U.S.C. § 922 (1994).

125. *Phillips*, 588 So. 2d at 144.

issue by concluding that the sale did not, in fact, violate the Act since .357 Magnum ammunition can double as rifle or pistol ammunition.<sup>126</sup>

Nonetheless, the court faced the question of whether the legal duty imposed upon dealers not to sell to mental incompetents, aside from the age issue, created any civil duty.<sup>127</sup> The plaintiffs, the victim's children, argued that the legal obligation to refrain from selling to mental incompetents created a duty to observe customers for signs of mental disturbance for a reasonable time.<sup>128</sup>

The court accepted that such a duty existed.<sup>129</sup> Furthermore, the court concluded that a few moments of observation of a seemingly polite and calm customer sufficed to fulfill the duty.<sup>130</sup> The testimony of the buyer's mother that her son had previously attempted suicide and qualified as a mental incompetent did not affect the court's decision.<sup>131</sup>

The value of this recognized duty to observe customers remains unclear. In cases like *Phillips*, a seemingly competent buyer can easily obtain a weapon that the Act intends to keep away from such a buyer. Furthermore, if a few moments of observation during the sales transaction are enough to satisfy the court in *Phillips*, will that always be enough? In other words, with what methods of observation can a licensed gun dealer find protection from liability? The leniency of this Louisiana court in regard to the duty to observe might alleviate the fears of some dealers that sales to undetectably disturbed people could create liability. However, the decision leaves dealers with no clear definition of their duty to observe buyers.

In addition, the duty presumably fails, in cases like *Phillips*, to prevent the sale. Thus, it fails to protect people from the exact harm the Act attempts to prevent. The duty arguably only supports dealer liability for sales to obviously deranged or, perhaps, drunk customers. Yet dealers who go through with such sales seldom avoid liability regardless of an articulated duty to observe.<sup>132</sup>

The Louisiana court in *Phillips v. K-Mart*<sup>133</sup> relied on *Phillips v. Roy*<sup>134</sup> as the case establishing a duty to observe. The *Roy*<sup>135</sup> court saw the question of common law duty as one requiring an obvious answer.<sup>136</sup> The *Roy* court concluded that the duty created by the sale of dangerous weapons required the seller to "carefully

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 145.

130. *Id.*

131. *Id.*

132. See *Angell v. Avanzini Lumber Co.*, 363 So. 2d 571 (Fla. Dist. Ct. App. 1978) (recognizing cause of action when dealer sold rifle to woman with glazed eyes who giggled and kissed strangers in the gun shop, repeatedly aimed an unloaded weapon at the seller's head while pulling the trigger, and later killed a man); *Bernethy v. Walt Faylor's, Inc.*, 653 P.2d 280 (Wash. 1982) (acknowledging cause of action after a man who had been drinking heavily for two full days purchased a weapon on the second day of the drinking spree and used it to kill his wife).

133. *Phillips*, 588 So. 2d at 145.

134. *Id.* at 144.

135. *Id.*

136. *Phillips v. Roy*, 431 So. 2d 849 (La. Ct. App. 1983).

observe the customer for any indication of incompetence and to refrain from selling a weapon to an individual manifesting signs of instability."<sup>137</sup>

The question becomes whether this articulation of the duty proves consistent with *Phillips v. K-Mart* which allowed a momentary and superficial observation. Furthermore, the *Roy* court's summary conclusion that the seller in that case may have breached her duty to observe<sup>138</sup> sheds little light on what a responsible Louisiana gun dealer can do to avoid liability.

This uncertainty results from combining the lenient standard accepted in *Phillips v. K-Mart* and the *Roy* court's unexplained conclusion that if the purchaser displays "signs of mental incompetence" in the seller's presence, the seller breaches a duty if the sale goes through.<sup>139</sup> Unfortunately, the *Roy* court failed to adequately define the "signs" a seller should rely upon in determining whether to make such a sale. Instead, the court set forth a duty defined by a "common-sense approach."<sup>140</sup>

The court required the seller to perform a "minimum" duty of spending a "reasonable time" watching a customer "carefully."<sup>141</sup> If the customer displays behavior that would alert an "average individual" to mental disturbance, the sale should be denied.<sup>142</sup> The *Roy* court's duty to "carefully" observe arguably required more than the casual observation accepted by the *Phillips v. K-Mart* court as fulfilling the duty.

The facts of the *Roy* case provide little more guidance when taken in combination with the court's conclusion that a seller must take care to look for "signs of mental incompetence." In *Roy*, the purchaser faced institutionalization five separate times in a state hospital.<sup>143</sup> The buyer's minor daughter indicated that her father spent the morning of the sale yelling, cursing, and threatening to kill her puppy.<sup>144</sup> The daughter wanted a friend at the police department to look for her father after he left their home.<sup>145</sup> She believed that anyone who saw her father that day would know something was terribly wrong with him.<sup>146</sup>

The buyer's mother classified her son's history of mental illness and institutionalization as common knowledge in Winnfield, Louisiana.<sup>147</sup> She also asserted that the owner of the gun shop in question knew of her son's mental problems.<sup>148</sup> The morning of the sale, she called a judge to ask that her son be reconfined to the state mental hospital.<sup>149</sup> The court did not regard these factors as relevant to the visible

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137. *Id.* at 852.

138. *Id.*

139. *Id.* at 853.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 850.

144. *Id.* at 852.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

state of the buyer at the time of the sale.<sup>150</sup> Furthermore, the sales clerk said the purchaser's appearance and behavior indicated no problems with mental illness.<sup>151</sup>

Consequently, the court in *Roy* remanded the case and left the question to a jury of whether the seller breached the duty to observe.<sup>152</sup> Here then, the duty appears inadequate. If the purchaser in *Roy* behaved normally during the sale, even careful observation would not lead the average person to stop the sale. However, the buyer's mother and daughter regarded him as mentally incompetent.<sup>153</sup>

The buyer spent a decade receiving intermittent hospital treatment at a mental institution.<sup>154</sup> Thus, the buyer failed to qualify as a competent gun purchaser under federal law.<sup>155</sup> Regardless of the buyer's failure to qualify as a competent gun purchaser, the duty to observe arguably does nothing to prevent this dangerous sale.

Thus, the case law leaves the gun dealer with a duty to observe and no clear indication of how to meet that duty. The *Roy* court relied on the seller's failure to have the buyer complete the Form 4473 as clear evidence of a breach of duty.<sup>156</sup> This reliance on an alternative basis for breach of duty further muddled the relevance of the duty to observe.

## 2. The Duty to Train

The *Phillips v. K-Mart* court addressed a duty that might have proven somewhat more effective in preventing illegal sales than the duty to observe. The *Phillips* plaintiffs tried to convince the court that K-Mart breached a duty to train its firearms and ammunition sales people to evaluate mental competence. However, the court found that the Act's provisions could not be read to impose a duty to train the clerks who deliver firearms to customers.

Nonetheless, the value of a duty to observe becomes more evident if a court adds to the analysis a duty to train employees to recognize mental instability. With both duties in place, a court conceivably can raise the standard of observation from that of an ordinary individual to that of an individual with special training.

Would this combination of duties work to prevent dangerous sales? Mental incompetence often remains hidden in the short time it takes to transact a sale. Thus, a need for a more extensive check exists if there is to be any actual compliance, as opposed to mere constructive compliance, with the underlying policies of the Act.

Furthermore, the purpose here is not to question the propriety of federal gun control legislation. The legislation is in place. This discussion focuses on lax enforcement of that legislation. Working under the assumption that the legislation was meant to be enforced, a way to enforce it must be found and implemented. The enforcement mechanisms in place arguably fail and, thus, deprive the laws of any

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150. *Id.*

151. *Id.* at 851.

152. *Id.* at 853.

153. *Id.* at 852.

154. *Id.* at 850.

155. 18 U.S.C. § 922(d) (1994).

156. *Roy*, 431 So. 2d at 853.

real effect on sales. Under the current system, not all courts recognize or even discuss a duty to train. Even when a court recognizes a duty to train, though, gun dealers still may not come away with a clear standard of behavior they can comply with in order to avoid liability.

For example, Mississippi recognized a duty to train in *Howard Brothers of Phoenix City, Inc. v. Penley*.<sup>157</sup> The Mississippi Supreme Court upheld a jury's decision against the seller but reduced the damages award from \$100,000 to \$35,000.<sup>158</sup> The department store incurred liability when a sales clerk at a locally owned discount department store handed a customer a .357 Magnum and placed a box of bullets for it on the counter.<sup>159</sup> The sales clerk then turned to retrieve a Form 4473.<sup>160</sup> At that moment, the customer took the bullets from the counter and loaded the revolver.<sup>161</sup> The customer then left the sales counter and headed up a store aisle with the loaded weapon.<sup>162</sup>

As the sales clerk and a store supervisor attempted to coax the customer into returning the gun, E.C. Penley appeared.<sup>163</sup> Seventy-year-old Penley, who was shopping for Freon, heard the customer's first shot and tried to hide.<sup>164</sup> The customer quickly grabbed Penley by the back of his shirt and took him hostage.<sup>165</sup>

The customer then fired the gun close to Penley's head and continually threatened to shoot Penley.<sup>166</sup> After the customer fired one more shot, police officers convinced him to release Penley and turn over the gun.<sup>167</sup> As a result of the shots fired close to Penley's head, Penley developed a constant ringing in his ears.<sup>168</sup> According to Penley's doctor, there was no cure for the permanent ringing.<sup>169</sup>

The *Howard Brothers* customer, a graduate of the tenth grade, spent time in mental institutions in Mississippi and Louisiana.<sup>170</sup> He spent the night before the hostage incident drinking and taking drugs.<sup>171</sup> The customer admitted he was high when he entered the store.<sup>172</sup> Yet the sales clerk noticed nothing unusual about him until she refused his request to take the pistol out of the store.<sup>173</sup> He made this request just before heading down the store aisle with the already loaded gun.<sup>174</sup>

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157. 492 So. 2d 965, 968 (Miss. 1986).

158. *Id.* at 965.

159. *Id.* at 966.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 967.

170. *Id.* at 966.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

Furthermore, a clinical psychologist from one of the institutions the customer spent time in labeled him as a chronic schizophrenic paranoid.<sup>175</sup> The psychologist testified that the customer could hide his symptoms.<sup>176</sup> In addition, the psychologist said that specialists could uncover this mental condition by asking certain questions.<sup>177</sup> The store only trained the sales clerk in filling out a Form 4473.<sup>178</sup> It provided its clerk with no instruction whatsoever regarding gun safety or handling customers who want to purchase guns.

Once again, the customer fell far short of qualifying as a competent gun buyer under the federal Gun Control Act. This customer had been committed to more than one mental institution.<sup>179</sup> The Act forbids sales to individuals that the seller knows or has reason to know have been committed to mental institutions.<sup>180</sup> What the Act does not do, though, is require the seller to make any inquiry into the customer's mental condition, aside from presenting the Form 4473 question concerning mental health.

The Act certainly attempts to keep guns out of the hands of mental incompetents. However, in the absence of overt and unmistakable signs of mental instability, a dealer who transfers a weapon to a mental incompetent technically complies with the law.

In the absence of obvious mental incompetence, the dealer has no reason to believe any mental incompetence exists. Consequently, sales to mental incompetents arguably become legal sales simply because the Act provides no guidelines or means for identifying customers whom courts have adjudicated incompetent or who have spent time in mental hospitals. These technically legal sales violate the policy expressed in the Act of denying sales to mental incompetents.

In light of this policy and the recognized danger that these troubled individuals pose, some courts simply refuse to hold form over substance and sanction such constructive compliance with federal law. The Mississippi Supreme Court proved to be one of those courts:

Two quite common facts of life should have been apparent to Howard Brothers: one, a loaded pistol is dangerous; and two, loaded pistols are especially dangerous in the hands of persons with serious personality disorders, or who are mentally disturbed. Yet this company gave no training, no guidelines, no safety instructions whatever for this young woman (paid at minimum wage) who they assigned as salesclerk in this department.

With little if any greater precaution than if she had been selling a can of salmon, in a single transaction she permitted a mentally deranged

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175. *Id.* at 967.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 966.

180. 18 U.S.C. § 922(d)(4) (1994).

person to possess not only a pistol but also the ammunition. Surely such conduct cannot be characterized as free of any negligence.<sup>181</sup>

The Mississippi Supreme Court went on to emphasize the importance of the sales clerk's lack of training in determining liability.<sup>182</sup> The court concluded that the excuse of not having reason to know of the customer's mental condition carried no weight since the clerk made no attempt to determine mental competence.<sup>183</sup>

Furthermore, the court stated that dealers should design safeguards to keep guns from "the hands of an unknown person" until a background check can be completed.<sup>184</sup> The court also referred to the standard of care as being elevated from that of an ordinary person to that of a mature and experienced firearms dealer.<sup>185</sup> Yet the Act does not spell out a duty to train or an elevated standard of behavior.

Consequently, dealers and victims' survivors often must look to judicially created guidelines to determine what behavior will create liability. The facts of the *Howard Brothers* case clearly created liability in the eyes of the Mississippi Supreme Court. While that court stated that dealers should train their employees and should set up safeguards to prevent sales to mental incompetents, it failed to specify what training and safeguards would be adequate. Thus, dealers and survivors know after *Howard Brothers* only that the events that left E.C. Penley's ears ringing create liability.

Furthermore, *Howard Brothers* is precedential only in Mississippi. No guarantee exists, though, that other state or federal courts will not adopt the Mississippi approach. Dealers, consequently, cannot be sure how to avoid liability. Survivors cannot be sure what their rights are. Most importantly, no one can be sure that guns will stay out of the hands of the mentally incompetent.

### *C. Proximate Cause and the Policy Issue*

The next issue in the negligence analysis is proximate cause. This step arguably provides the true battleground for dealer liability. With proximate cause, the question becomes whether a mental incompetent's handling of a weapon in a manner that harms others should be foreseeable.

Defendant's often argue that the mental incompetent's or the felon's actions constituted an unforeseeable intervening criminal act. Nonetheless, the fear inherent in the Act's provisions appears to be that mental incompetents and felons will harm innocent people if dealers provide them with weapons. The answer courts provide when faced with this question varies.

These variances arguably result from courts' policy determinations of which party should win. Some courts sympathize with victims and survivors. Some courts recognize that the Act provides dealers with no system of preventing the very sales it purports to make illegal. After all, the Act provides dealers with an easy way out

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181. *Howard Brothers*, 492 So. 2d at 968.

182. *Id.* at 969.

183. *Id.*

184. *Id.*

185. *Id.*



with its "reason to know" language. Yet, as the Mississippi Supreme Court case illustrates, some courts refuse to allow dealers to use the easy way out. These courts prefer to honor the underlying policy and substance of the law.

In an attempt to settle this area of law, two United States Senators have taken action and proposed legislation that creates clear civil liability for Act violations. Dealers certainly deserve to know in advance which sales will create liability. Regardless of the feelings of animosity survivors and victims may have for dealers, many rely on the legal gun trade for their livelihood. On the other hand, irresponsible dealers should have no way out of liability.

Dealers who try to comply with the law should have clear guidelines to follow, and survivors and victims face enough hardship without dealing with uncertainty in liability. However, clearing up liability after the fact falls short of solving the real problem. Furthermore, it is not certain that this proposed legislation will fulfill its purpose adequately. It may never, in fact, become law.

Dealing with the aftermath of mental incompetents or felons who buy guns from federally licensed dealers through tort liability does not prevent injury. The ATF's Form 4473 system has proven fairly useless in preventing injury as well. Many of the case law's seemingly qualified buyers have criminal records or have been institutionalized in state hospitals. Nevertheless, dealers only learn of such information if the purchaser offers it. Thus, dealers need to be able to check out customers before a sale without having to rely on the customer's honesty.

#### *D. Causation*

The current system, however, remains, and this system relies heavily on proximate cause for liability determinations. While a finding of negligence proves essential in determining liability, a gun dealer's negligence alone does not create liability. Without causation, victims and survivors have no remedy.

At times, courts may not even allow the question to reach a jury. For example, in *Drake v. Wal-Mart, Inc.*,<sup>186</sup> an Oklahoma appellate court determined that Wal-Mart could not have foreseen a buyer's suicide.<sup>187</sup> The Oklahoma Court of Appeals affirmed summary judgment for Wal-Mart.<sup>188</sup>

The gun buyer's mother alleged that Wal-Mart violated the federal Gun Control Act when it sold a gun to her nineteen-year-old daughter.<sup>189</sup> The mother's allegation rested on the fact that the Act prohibits sales of firearms other than rifles or shotguns to anyone under twenty-one. Thus, Wal-Mart allowed the daughter to purchase a handgun the Act forbids her to buy.<sup>190</sup>

Furthermore, the mother asserted that her daughter appeared disturbed at the time of sale.<sup>191</sup> In Oklahoma, a state statute prohibits sales to individuals who are

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186. 876 P.2d 738 (Okla. Ct. App. 1994).

187. *Id.* at 742.

188. *Id.* at 739.

189. *Id.* at 740.

190. *Id.*

191. *Id.* at 741.

"mentally or emotionally unbalanced or disturbed."<sup>192</sup> Consequently, Oklahoma law seems to forbid sales to an even broader class of persons than the federal Act. Technically, the federal Act only forbids sales to persons who have been adjudicated a mental incompetent or committed.<sup>193</sup>

At the time of the sale, the buyer "appeared seriously underweight."<sup>194</sup> She approached the sales counter with no knowledge of guns and no idea what she wanted to buy.<sup>195</sup> At first, she hesitated to touch the guns the sales clerk offered her.<sup>196</sup> Before she left the store, though, the buyer handled the gun she bought and demonstrated that she could properly insert the ammunition clip.<sup>197</sup> She told the sales clerk's supervisor that she wanted a gun because she lived in a rough neighborhood.<sup>198</sup>

The buyer in this case made no attempt to hide her age.<sup>199</sup> Both her driver's license and the Form 4473 she filled out indicated she was nineteen.<sup>200</sup> Thus, Wal-Mart could not complete the sale and comply with federal law forbidding the sale of handguns to persons under twenty-one.

However, the Oklahoma court chose not to address the issue of negligence under either a negligence per se or a common law theory. The court refused to decide whether violations of gun control laws created any private cause of action.<sup>201</sup> The issue of Wal-Mart's negligence in allowing the sale simply became irrelevant in light of the court's determination that the buyer's voluntary suicide cut off any liability based on the store's negligence.<sup>202</sup>

The determination of whether this buyer's actions cut off liability for a seller turned on the foreseeability of her suicide.<sup>203</sup> The Oklahoma appellate court avoided the conclusion that all suicides prove unforeseeable.<sup>204</sup> Yet the court refused to let the question of foreseeability go to a jury.<sup>205</sup> The court held that reasonable persons could only find the buyer's suicide unforeseeable.<sup>206</sup> However, in so holding, the court summarily discounted expert testimony from a psychologist and a gun dealer to the contrary. Both witnesses testified that the buyer's actions were "red flags" pointing to a need to make further inquiry before allowing the sale.<sup>207</sup>

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192. 21 OKLA. STAT. § 1289.12 (1991).

193. 18 U.S.C. § 922(d)(4) (1994).

194. *Drake*, 876 P.2d at 741.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 742.

206. *Id.*

207. *Id.* at 741.

The court discounted this testimony by stating that neither witness testified that the specific act of suicide should have been foreseen.<sup>208</sup> However, the unforeseeability of suicide specifically does not require truncation of inquiry into the foreseeability of harm to the buyer or others. Considering this expert testimony, it seems difficult to imagine that reasonable minds could not differ when confronted with the foreseeability of this suicide. A reasonable mind could easily contemplate the possibility of future harm from a sale of a gun to a hesitant and nervous nineteen-year-old. In fact, the buyer in this case even asked if she could stop the sale and get her money back at one point in the transaction.<sup>209</sup> In addition, another customer noticed the buyer seemed troubled and "looked blank and vacant."<sup>210</sup>

The *Drake* case differs from previously discussed cases in that the buyer carried no felony charges or convictions and had not been adjudged mentally incompetent. However, her age disallowed the sale, as did the Oklahoma statute banning sales to the mentally or emotionally disturbed. A background check would not have uncovered past criminal acts or mental problems in this case. Nonetheless, the sale clearly violated the law in regard to the buyer's admitted age. The troubling conclusion reached in *Drake*, though, seems to be that a blatant violation of federal law creates no liability for gun dealers because reasonable minds cannot foresee harm from such sales.

Any individual's actions with a gun, whether suicidal or criminal, could easily be labeled as unforeseeable, superseding intervening causes. The same suicidal or criminal actions carry the label of foreseeable and direct results of unlawful sales just as easily. Thus, proximate cause appears to be the real battleground where these cases are won and lost.

A court's determination of which label to place on the buyer's actions often reflects underlying considerations, presumably based on public policy. Some courts articulate those considerations, while others do not. Regardless, inconsistency and unpredictability in the application of tort law to these gun sales result.

Another case filed against Wal-Mart in Florida and decided in 1994, the same year as *Drake*, illustrates this unpredictability when contrasted with *Drake*. Sandra Coker sued Wal-Mart in a wrongful death action after a Wal-Mart gun customer murdered her husband.<sup>211</sup> In *Coker v. Wal-Mart*, a Florida appeals court reversed a final order dismissing Sandra Coker's amended complaint.<sup>212</sup> The lower courts found her complaint insufficient in its allegation of the element of causation.<sup>213</sup> The appellate court disagreed.<sup>214</sup>

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208. *Id.*

209. *Id.*

210. *Id.*

211. *Coker v. Wal-Mart*, 642 So. 2d 774 (Fla. Dist. Ct. App. 1994), *rev. denied*, 651 So. 2d 1197 (Fla. 1995).

212. *Id.* at 775.

213. *Id.*

214. *Id.*

Sandra Coker's husband died when two men robbed the auto parts store where he was filling in for a sick employee.<sup>215</sup> The robbers purchased a box of .32 caliber bullets four hours before the murder.<sup>216</sup> The sale violated the federal Gun Control Act.<sup>217</sup> Both ammunition purchasers were under the age of twenty-one.<sup>218</sup> As previously noted, the Act forbids the sale of such ammunition to persons under twenty-one.<sup>219</sup> Unfortunately, Wal-Mart failed to request identification from either purchaser.<sup>220</sup> Furthermore, Wal-Mart failed to ask either purchaser his age.<sup>221</sup>

Wal-Mart made no attempt to refute its negligence in the sale.<sup>222</sup> Instead, Wal-Mart argued that the Act created no duty to Sandra Coker's husband and that the purchasers' intervening act of murder removed any possible liability on its part.<sup>223</sup>

The lower courts and the appellate court agreed that the Act created a duty.<sup>224</sup> But the lower courts found the murder to be outside the seller's realm of foreseeability.<sup>225</sup> Thus, the lower courts concluded that, as a matter of law, Wal-Mart could not be liable for its admitted negligence.<sup>226</sup>

The appeals court simply rejected the contention that Wal-Mart could not have foreseen the murder:

Had Wal-Mart not sold the bullets to Bonifay and Fordham, they would have had no other means of obtaining ammunition that evening, and Billy Wayne Coker would not have been murdered since he was not a regular employee of the auto parts store but was only filling in that fateful night for a sick employee.<sup>227</sup>

Whether, in fact, the purchasers would have found another means of obtaining ammunition that night proves difficult to determine. This wording of the proximate cause test conveys a more definite foreseeability than the law arguably requires. Proximate cause does not require so much that the negligence creates the only means for the injury to occur, as it requires the injury to be a foreseeable result of the negligence.

Regardless, the Florida court in *Coker* refused to dismiss the claim for insufficiency of the causation allegation. The court could have justified dismissal just as easily as it justified remanding the case and leaving the question of causation to a jury. Consequently, the court's articulation of its reasons for remanding becomes paramount to understanding dealer liability.

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215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. 18 U.S.C. § 922(b)(1) (1994).

220. *Coker*, 642 So. 2d at 775.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 775, 778.

225. *Id.* at 775.

226. *Id.*

227. *Id.* at 775.

The *Coker* court began its proximate cause analysis with a general statement of the nature of the law. Tort law, the court said, defines proximate cause in terms of the foreseeability that a defendant's conduct would cause injury similar to the injury that actually occurred.<sup>228</sup>

In addition, the court recognized that neither the "exact nature and extent" of the injury nor the "precise manner of its occurrence" need be foreseeable.<sup>229</sup> Furthermore, tort law provides no remedy for bizarre injuries that defy the reasonable boundaries of foreseeability in light of common human experiences.<sup>230</sup> And only these truly bizarre injuries support a finding of no proximate cause as a matter of law.<sup>231</sup>

Noting that proximate cause determinations properly rest with a jury in most cases, the *Coker* court refused to find no proximate cause as a matter of law.<sup>232</sup> The court recognized the policy behind the Gun Control Act as the prevention of gun ownership by the enumerated persons to whom the Act forbids sales.<sup>233</sup>

A motion to dismiss for lack of causation, the court determined, simply proved inappropriate in a case involving a Gun Control Act violation.<sup>234</sup> Consequently, the *Coker* court found the policy behind the Act could support foreseeability sufficient for proximate cause regardless of a purchaser's intentional or criminal actions following the sale.<sup>235</sup>

A comparison between *Drake* and *Coker* illustrates how courts differ as to whether proximate cause can be decided by a judge as a matter of law. Arguably, the facts in *Drake* fail to rise to the level of bizarreness that the *Coker* court seems to indicate the determination of proximate cause as a matter of law requires. Other state courts, however, stand beside the Oklahoma Court of Appeals in *Drake* to find buyers' criminal actions break the causal chain as a matter of law.<sup>236</sup>

Thus, some courts choose to keep the question from a jury. Presumably, these courts intend to remove the possibility of liability that arises with the presentation of the question to a jury. These judges apparently feel strongly enough that liability should not incur that they become willing to deny a jury the opportunity to answer the question. The importance of the determination of causation as a matter of law rests in the fact that such a determination removes from the jury a question over which reasonable minds easily could differ.

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228. *Id.* at 776.

229. *Id.*

230. *Id.*

231. *Id.* at 778.

232. *Id.*

233. *Id.* at 777.

234. *Id.* at 778.

235. *Id.*

236. See *Everett v. Carter*, 490 So. 2d 193 (Fla. Dist. Ct. App. 1986) (upholding summary judgment for dealer on grounds that minor buyer's use of gun in homicide broke chain of causation); *Hulsmann v. Hemmeter Dev. Corp.*, 647 P.2d 713 (Haw. 1982) (affirming summary judgment for seller in negligence claim after buyer, a convicted criminal, shot plaintiff).

For example, in *Robinson v. Howard Brothers of Jackson*, the Mississippi Supreme Court, interestingly enough, decided that no causation existed as a matter of law despite the defendant's negligence.<sup>237</sup> The defendant admitted negligence in its sale of a pistol and fifty rounds of ammunition to a minor in violation of the Gun Control Act.<sup>238</sup> The suit arose after the purchaser murdered his former lover with the same pistol and ammunition.<sup>239</sup>

The court concluded that the purchaser's act of murder, by law, insulated the dealer from liability for its negligence.<sup>240</sup> In reaching this conclusion, the court relied upon the idea that less reason exists to foresee "premeditated malicious acts as opposed to acts [that] are merely negligent."<sup>241</sup> This theory of foreseeability presumes that even negligent actors may assume that others will not violate criminal laws.<sup>242</sup>

The Mississippi Supreme Court also relied on the fact that the buyer held no criminal record at the time of sale to rule out the possibility of the foreseeability of murder.<sup>243</sup> According to the court, the buyer's premeditated murder provided the lone causation for the victim's death.<sup>244</sup> Even a dealer who sells guns in violation of the Gun Control Act possesses the privilege of presuming that buyers will avoid committing crimes.<sup>245</sup> While this presumption of compliance with criminal laws appears appropriate in the foreseeability analysis with other forms of negligent acts, the presumption arguably falls apart with negligent gun sales. The nature of gun sales prohibited by the Act seems to indicate that crimes committed by incompetent buyers prove to be exactly the danger lawmakers foresaw from negligent sales.

#### V. Public Policy Considerations for the Future

The tort principles of duty and proximate cause shape all courts' determinations of negligence and liability with gun sales. Yet these principles tend to be elusive themselves. Tort law principles, arguably, lack the clarity and certainty that gun dealers, survivors, and victims deserve.

Tort law's flexibility and policy focus fit certain situations well. For example, a flexible approach to liability often serves the principles of fairness and justice when intervening criminal acts cause injury. But gun sales are different. The danger of guns rests not in how they are used, sold, or maintained but in their very nature. When guns are used to inflict harm or death, guns fulfill the exact purpose for which people designed them.

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237. *Robinson v. Howard Brothers of Jackson, Inc.*, 372 So. 2d 1074, 1076 (Miss. 1979).

238. *Id.* at 1074.

239. *Id.* Although the Robinson court rejects an argument for strict liability, other courts have been more receptive to strict liability for dealers who sell to minors. See *Tamiami Gun Shop v. Klein*, 116 So. 2d 421 (Fla. 1959).

240. *Robinson*, 372 So. 2d at 1076.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

Currently, however, no legislation exists that removes gun sales from general tort principles. Consequently, the malleable principles that rule determinations of negligence apply when dealers sell guns in violation of the existing gun control legislation. Thus, policy considerations and an analysis of the proper resting place for a civil burden become appropriate when dealers violate the law and injury results.

## VI. Approaches to Gun Control

### A. The Politics

Groups like the National Rifle Association and Handgun Control, Inc. take their respective sides of the gun control battle straight to Congress. These groups wage their wars through relentless lobbying efforts.<sup>246</sup> Nonetheless, the real force behind change in the gun industry may rest in the power of public opinion.

A 1994 *Washington Post* poll of Maryland's citizens revealed that seventy-one percent of the respondents favored a gubernatorial candidate who supported proposed state gun control laws.<sup>247</sup> Furthermore, a Maryland politician named Peter Franchot says his colleagues may not grasp the significance of the increasing strength of public support for gun control.<sup>248</sup> Franchot plans to introduce legislation banning private ownership of handguns.<sup>249</sup>

Not surprisingly, a group called Marylanders Against Handgun Abuse put together a legislative package that many state lawmakers supported.<sup>250</sup> The package would limit handgun purchases to two per year, require a license from state police, and impose civil liability when illegal sales or transfers resulted in harm.<sup>251</sup> Thus, the force of gun control lobbying efforts seems to find added strength in public support when that public support carries the vote.<sup>252</sup>

While lobbyists and public opinion work to shape the nature of gun control legislation,<sup>253</sup> these efforts cannot escape the compromise of politics. But outside of the pressures of the political realm, measures that will enforce the federal gun control legislation that is already in effect become less complicated. Furthermore, the incentives for effecting that enforcement outweigh the administrative costs entailed.

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246. Lloyd Cutler, *License and Restrict Handguns*, WASH. POST, Dec. 21, 1993, at A23.

247. Charles Babington & Richard Tapscott, *Maryland Seems Poised for Stricter Gun Control; Frightened by Crime, Half of Residents Favor Ban on Handgun Sales, Poll Shows*, WASH. POST, Jan. 9, 1994, at B1.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. Students at Howard University School of Law took gun control to the voters in 1994 by authoring an initiative that, if passed by voters in the District of Columbia, calls for strict liability for the city's gun manufacturers, importers and dealers when their weapons injure or kill. Sandra Goldsmith, *Taking the Initiative on Gun Control*, STUDENT LAWYER, Oct. 1994, at 5.

*B. The Numbers*

Regardless of the controversy surrounding gun control and the vast differences in the opinions espoused by opposing sides, few would be so bold as to deny that gun violence grips this country in a way it grips few others. Handgun Control, Inc.'s annual poster for 1993 compared United States handgun deaths to handgun deaths in Great Britain, Sweden, Switzerland, Japan, Australia, and Canada.<sup>254</sup> The deaths in those countries ranged from ten to ninety-one in 1990.<sup>255</sup> United States handgun deaths totaled 10,567.<sup>256</sup>

In the first few years of this decade, guns killed 60,000 people in America.<sup>257</sup> This number tops the number of United States soldiers killed in Vietnam.<sup>258</sup> Furthermore, Department of Justice statistics indicate handguns play a part in 33 rapes, 575 robberies, and 1116 assaults every twenty-four hours.<sup>259</sup>

Perhaps the most shocking statistics of all come from a Los Angeles hospital.<sup>260</sup> The hospital had never admitted a child under the age of ten for gunshot wounds before 1980.<sup>261</sup> The seven years that followed brought thirty-four children under ten to the hospital with gunshot wounds.<sup>262</sup>

As one observer noted:

America is currently in the midst of a gun crisis that can no longer be considered just a manifestation of the pioneer spirit; instead, it has become a costly global embarrassment. That a crisis does exist should be well beyond dispute by now, given the bleak statistics of gunshot death and damage — yet these statistics, capable of kindling outrage in a stone, have failed to impress America's gun industry and the gun culture that supports it.<sup>263</sup>

*VII. Criticism of the Judicial Response*

Likewise, judicial attempts to deal with this gun crisis have failed to impress critics. These critics find fault in inconsistent legal obligations and judicial expansion of civil liability to dealers. As exemplified by the case law, state courts disagree about whether violations of gun control legislation should create civil liability.<sup>264</sup>

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254. Cutler, *supra* note 246.

255. *Id.*

256. *Id.*

257. Larson, *supra* note 1, at 49.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 49, 50.

263. *Id.* at 49.

264. Anthony P. Dunbar, *Torts — Liability of a Gun Dealer for Selling to a "Mental Incompetent,"* 58 TUL. L. REV. 1263, 1267 (1984).



In general, the statutory prohibitions on sales influence courts in their determinations of what degree of care sellers owe the public.<sup>265</sup> Yet determinations of liability seem to turn, more than anything else, on "what appears to be a subjective analysis of the actual cause of the injury."<sup>266</sup> Courts often look to whether a dealer's actions merely "had something to do with the harm" or were a "necessary ingredient of the accident."<sup>267</sup>

Courts, understandably, have been more willing to find dealers liable for gun violence than manufacturers.<sup>268</sup> Retailers directly control their sales.<sup>269</sup> Retailers also have a better opportunity to observe purchasers.<sup>270</sup>

Nonetheless, even adherence to the strict standard of care potentially required of dealers by gun control legislation fails to prevent all dangerous sales.<sup>271</sup> Yet few courts consider a stricter standard, and no courts apply a stricter standard.<sup>272</sup> Courts still have room to find liability, though,<sup>273</sup> and damage awards range from around \$100,000 to more than \$10 million.<sup>274</sup>

Gun violence cases naturally stir up public policy arguments that run the gamut from public safety concerns to considerations about who has a right to purchase or sell a gun. However, determinations of gun dealer liability carry economic impacts as well.<sup>275</sup> Gun dealer cases potentially set a precedent for liability for retailers of many other products that could be misused by incompetent persons or minors.<sup>276</sup> For example, the analysis used for gun retailers could be applied to sellers of knives, baseball bats, or scissors.<sup>277</sup>

Thus, some critics argue sellers of scissors could face, for example, the possibility of a duty to observe all purchasers to avoid liability.<sup>278</sup> However, any fears of liability for scissors dealers should logically be allayed by the absence of federal legislation that prohibits the sale of scissors to mental incompetents and minors. Furthermore, scissor violence and scissor crime have yet to reach epic proportions in this country. As dangerous as scissors may be in the wrong hands, scissors are not guns.

In addition, critics of dealer liability and courts recognize that liability might adversely affect the certainty of American business relations.<sup>279</sup> The problem

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265. *Id.* at 1270.

266. *Id.*

267. *Id.*

268. Sumpter, *supra* note 34.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*; Gail K. McCracken, *Responsibility of the Retailer: Don't Ask, Don't Tell*, 72 MICH. B.J. 1138, 1142 n.30 (1993).

275. Sumpter, *supra* note 34.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

appears to stem from situations in which sellers must investigate the competence of each individual customer in order to avoid liability.<sup>280</sup>

The investigation requirement creates delay and uncertainty.<sup>281</sup> Furthermore, in light of the economic interests at stake as well as the public policy considerations gun dealer liability invokes,<sup>282</sup> courts and observers often suggest that courts do not possess the resources to handle the problem of gun violence.<sup>283</sup>

In addition, the increased uncertainty that liability creates indirectly affects consumers.<sup>284</sup> Liability creates the need for liability insurance.<sup>285</sup> Increased liability, in turn, drives up the cost of this insurance.<sup>286</sup> Dealer costs also would increase due to the expense of preventive employee training programs designed to reduce the risk of liability.<sup>287</sup> Dealers might even have to spend money investigating their customers.<sup>288</sup>

Consumers ultimately pay for these measures through higher gun prices. Consequently, critics argue that "this 'deep pocket' technique would eventually be impoverishing if applied to all types of products, and has the potential to greatly hinder legitimate economic activity."<sup>289</sup> However, the fact still remains that guns have little in common with other consumer products.

Courts have expressed no intent to apply the gun dealer analysis to other products. On the contrary, courts have been preoccupied with the unique danger of guns in their struggle to iron out an appropriate way to determine liability in these cases. Once again, the mere existence of federal gun control legislation and its state counterparts pays tribute to the unique character of this product.

As noted previously, some observers have voiced serious concerns about the courts' role in shaping gun control policy through determinations of gun dealer liability. The accusation stands that "attempts to use the courts as vehicles to create merchant liability can be viewed as a blatant circumvention of the legislative process."<sup>290</sup>

The legislative forum may, in fact, lay claim to the title of "most appropriate forum" for handling gun control.<sup>291</sup> Yet this criticism of judicial activity in gun dealer cases ignores the fact that the legislature has, at least partially, addressed the issue and its broad policy implications by enacting federal gun control legislation. The courts rarely, if ever, ignore this legislation and its underlying policy.

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280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

Nonetheless, criticism of judicial activity does not deserve summary dismissal. After all, the absence of federal legislation that creates or denies civil liability for gun dealers who violate the law lies at the heart of the inconsistency and uncertainty of the state of the law. Furthermore, legislative debate arguably provides for a more complete analysis of the concerns involved than a dispute between two self-interested parties involved in litigation.

Critics argue that the courtroom case tends to ignore the utility of guns for legitimate uses, such as hunting and collecting. Guns, critics further argue, provide some owners with a positive sense of security that defies monetary evaluation. However, it is not clear why courts should place value in a sense of security that arguably proves to be more imagined than real.<sup>292</sup>

Those observers who favor the legislative arena for the job of ironing out gun dealer liability dismiss the power of special interest groups, including the once wealthy National Rifle Association, as proper players in a democratic system.<sup>293</sup> They argue that "[i]f people truly oppose gun ownership, their proponents will organize, garner an equal or greater amount of resources to participate in the lobbying process, and these views will eventually prevail."<sup>294</sup> However, lobbying forces that favor gun control arguably face a formidable opponent in the N.R.A. due to its established influence and once famous wealth, even if they do find support from a significant segment of the population.<sup>295</sup>

#### A. Looking for Solutions

Few commentators would disagree that any resolution of the issue of dealer liability requires the consideration of complex economic and emotional factors.<sup>296</sup> Likewise, few would disagree that whatever the guidelines are, these guidelines must be more clear than the current body of case law makes them.<sup>297</sup> But few critics venture past these conclusions to suggest practical solutions. However, if one accepts the proposition that the problem rests in a rising tide of gun violence that threatens both gun control advocates and opponents alike, the need for preventive action on the part of legislators and judges becomes clear.

#### B. Gun Control and the Second Amendment

Opponents of gun control inevitably ground their opposition in the United States' Constitution's Second Amendment. But at the annual American Bar Association meeting in 1994, the ABA committed itself to active support of legislative and

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292. Larson, *supra* note 1, at 50.

293. Sumpter, *supra* note 34.

294. *Id.*

295. Interestingly enough, though, in what appears to be a response to lawsuits and public fear about gun violence, Wal-Mart quit stocking handguns in February 1994. Some of the stores still stock rifles and shotguns. See Arena, *supra* note 31; Biddle, *supra* note 31; Wal-Mart Won't Stock Handguns, CHI. TRIB., Dec. 22, 1993, at 1.

296. Sumpter, *supra* note 34.

297. *Id.*

educational attacks on gun violence.<sup>298</sup> Perhaps more importantly, though, the ABA resolved "to make widely known the fact that the Supreme Court and lower federal courts have consistently, uniformly held that the Second Amendment . . . right to bear arms is related to a 'well-regulated militia,' and that there are no federal constitutional barriers to regulation of firearms in private hands."<sup>299</sup> The ABA, however, has yet to champion private causes of action for gun violence victims.<sup>300</sup> The issue of civil liability will reportedly receive further study.<sup>301</sup>

### *C. The Danger in Guns Used for Protection*

Interestingly, many Americans glean a sense of security from owning guns. Guns, they believe will protect them from criminals who, of course, have guns. Yet American children more often suffer gunshot wounds at the hands of relatives than unknown criminals.<sup>302</sup> In fact, a New England Journal of Medicine study indicates that guns kept in homes for protection actually threaten the safety of the members of those households.<sup>303</sup> The study showed that a gun kept in a home is much more likely to be involved in the death of a household member than to be used in self-defense.<sup>304</sup> Furthermore, the risk of a shooting death increased by almost 300 percent in households where the residents kept guns.<sup>305</sup>

Still, the fears of those Americans who own guns for self-protection rest in a reality of violent crime.<sup>306</sup> By the close of the 1980s, 66.7 million handguns and 200 million firearms of all kinds circulated in this country.<sup>307</sup> And "[i]f these guns were controlled by a legion of sober adults, we'd have far less to worry about."<sup>308</sup>

Nothing remotely resembling a "legion of sober adults" controls the mind-boggling number of firearms in this country. To worsen the situation, little doubt exists as to the brutal and awesome strength of the illegal gun trade. In spite of all this, the federal procedures for legally purchasing guns remain extremely lax.<sup>309</sup>

298. James Podgers, *In the House of Delegates*, A.B.A. J., Oct. 1994, at 100.

299. *Id.*

300. *Id.*

301. *Id.*

302. Larson, *supra* note 1, at 50.

303. Colman McCarthy, *Taking Aim at Gun Ads*, WASH. POST, Jan. 22, 1994, at A17.

304. *Id.*

305. *Id.*

306. Larson, *supra* note 1, at 50.

307. *Id.*

308. *Id.*

309. Larson states:

Gun aficionados may liken the Bureau of Alcohol, Tobacco, and Firearms to the Gestapo, but in its relationship with America's gun dealers the ATF behaves more like an indulgent parent. This is partly the result of restrictions imposed by budget and statute, and partly an institutional reluctance to offend its primary source of investigative leads or to provoke the cantankerous gun lobby. The ATF is in the business not of seeking to prevent the migration of weapons, a spokesman told me, but of building and preserving a paper trail for the day when those weapons will be used to commit major crimes.

*Id.* at 65.

### *VIII. Working on the Future*

#### *A. The Need for a New Approach*

Nothing in the federal gun control laws, case law, or criticisms of the law illuminates a straight and clear path to perfect justice in the area of gun dealer liability. The issue spurs complicated legal, economic, and emotional arguments. The key to addressing liability for dealers, however, may, at least initially, rest in a simple approach. Gun dealers sell guns. Guns are like no other product. When guns work, guns kill. When guns work well, guns kill quickly. Consequently, gun dealers need special treatment from the law. Generally applied tort principles simply fail to address the unique character of the gun dealer's product.

Further analysis requires an additional uncomplicated proposition: Gun violence, to the degree that it exists in this country, is not acceptable. Thus, steps need to be taken to remove the legal gun trade's supply of weapons to minors, felons, and the mentally incompetent. The illegal gun trade, while a problem well worth addressing, fails to be relevant in the licensed gun dealer liability analysis.

The gun dealer issue focuses on federally licensed firearms dealers and a federally regulated trade. The mere existence of a thriving illegal gun trade serves as no excuse for a careless approach to legal sales. The illegal gun trade bears no blame for the harm that licensed dealers' sales inflict upon innocent victims.

Yet one must not forget that the current state of the law places even conscientious dealers in a precarious position. Can they be civilly liable for sales in violation of federal and state gun control laws? Perhaps. They cannot be sure unless legislation securing civil liability for violative sales passes. Do they have a duty to observe customers? Probably. But when is an observation adequate? In the absence of blatantly and unmistakably incompetent behavior, the definition of legally adequate observation proves elusive. Furthermore, the judicial recognition of civil liability for violations of law provides no answer to the questions about the exact duty of dealers and their role in the causation chain.

The fact remains, though, that the dealers serve as the gatekeepers of the industry. Only the dealers interact with purchasers. Only the dealers possess the power to approve or disapprove sales. Thus, as the Supreme Court recognized in *Huddleston v. United States*,<sup>310</sup> dealers logically serve as the enforcers of the federal Gun Control Act's prohibitions against sales to minors, felons, and mental incompetents. However, to require gun dealers to be superhuman predictors of unpredictable human behavior proves terribly harsh.

Therefore, unquestioned liability for all sales to all persons who, in hindsight, clearly fit the definition of a mental incompetent appears unfair. In fact, such a scheme of liability arguably punishes dealers unjustly for participating in the legal gun trade. The key to unfairness here rests in the simple recognition of the licensed dealer's choice of livelihood as a legal trade.

A proposed scheme of liability should account for the seriousness of the potential for harm to innocent victims and the need to let licensed dealers participate in their

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310. 415 U.S. 814 (1974).

chosen trade. Furthermore, licensed dealers who conscientiously follow proper procedures for sales should be protected from liability when a previously stable human mind suddenly turns an apparently harmless sale into a "macabre tale of wounds."<sup>311</sup> At the same time, the innocent people who lose their good health or loved ones because of irresponsible dealers who refuse to turn down a sale deserve compensation at those dealers' expense.

Currently, dealers look to Form 4473 as the only tool provided by federal regulations to help them comply with the law. However, the form arguably fails to prevent dangerous sales. Purchasers need only lie when filling out the form, and perhaps avoid behavior that blatantly points to mental incompetence, to obtain a weapon. Consequently, the Gun Control Act's enumerated ineligible purchasers confront no barriers to buying a weapon other than their own honesty. Relying on the honesty of minors, felons, and mental incompetents to prevent sales of deadly weapons reflects outrageous optimism.

### *B. A Real Check*

The current system facilitates merely constructive dealer compliance with certain provisions of federal gun control legislation. For, as previously noted, dealers must rely on the honesty of purchasers who fill out Form 4473. As severe as the potential for harm from prohibited sales appears, dealers receive no other tools of enforcement aside from this often useless form.

The 1993 Brady Handgun Violence Prevention Act provides for a scheme similar to an ideal scheme.<sup>312</sup> However, the Brady Act does not require a complete check but a check that focuses on criminal records.<sup>313</sup> Furthermore, the Brady Act requires a five-day waiting period for the background check that tends to create opposition among gun owners.<sup>314</sup> In addition, the Brady Act requires only that a "reasonable effort" be made in reference to the background check.<sup>315</sup> Most importantly, the Brady Act does not provide for civil liability for gun dealers who violate the Act.

A stricter and more immediate check of purchaser backgrounds, however, potentially solves the dealer liability problem. Purchasers understandably disfavor waiting for background checks that could delay sales for days or months. An ideal check requires no such wait. While a more extensive check than the current legislation requires might prove useful, enforcement of existing legislation does not rest on such a check.

The onsite check the federal gun control laws call for entails a minimal search of existing records of age, criminal prosecutions, or indictments and records of adjudication of mental incompetence or institutionalization. Such records could easily be entered into and accessed from a database the law could require all dealers

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311. Larson, *supra* note 1, at 50.

312. 18 U.S.C. § 922 (1994).

313. *Id.*

314. *Id.* § 922(s)(1)(A)(i)(IV), (s)(2).

315. *Id.*

to use. Alternatively, dealers could call in their onsite checks. The call-in approach, however, requires administration of the check process that the administrators could avoid by allowing dealers to check the federal database themselves.

While the onsite check system adds to dealer costs, the federal government has shown little concern for such costs by steadily increasing the fees for federal firearms dealer licenses in recent years. After all, increasing the indirect costs of dealing in weapons differs from increasing the direct licensing costs in name only.

Such a system of onsite checks opens the door for certainty in liability. With onsite checks, dealers would immediately know whether a sale could be completed lawfully. Dealers who checked for and found no record of criminal activity, adjudication of mental illness, institutionalization in public hospitals, or minority status could complete sales confident that they would incur no liability.

If harm were to result from a qualified purchaser's ownership of a weapon, that harm would be unforeseeable. The Gun Control Act simply does not foresee danger in sales to qualified purchasers. Likewise, a dealer's sale to a qualified purchaser under the Act would not support a causal link to any resulting harm. Once again, the Act's lack of concern over sales to qualified purchasers indicates that harm from such sales is the result of unpredictable human behavior.

On the other hand, for dealers who completed sales without checking the buyer's qualifications or in disregard of, for example, a criminal record, liability would automatically incur. This liability should require no further inquiry into duty or causation. Simply put, sales to persons the Act deems unqualified buyers creates clear liability if the federal system allows for an onsite check.

Minors, convicted felons, and mental incompetents show up in the Act as unqualified purchasers because their possession of guns creates the expectation of danger. Furthermore, the Act specifically forbids dealers from making sales to these unqualified buyers. Consequently, the Act arguably contemplates a causal link between the forbidden sales and the potential resulting harm.

Thus, an onsite check system allows for a form of strict liability when dealers sell in disregard for or in knowing violation of the Act, and harm results. Strict liability for dealers may seem harsh considering the potential for danger of liability from each and every gun sale. However, this system of an onsite check and strict liability makes the avoidance of liability easy for conscientious dealers.

Dealers who simply complete checks and truncate sales to persons whose recorded past renders them unqualified purchasers under the Act will avoid liability. Thus, conscientious dealers could escape fears of liability for bizarre events resulting from seemingly proper sales. At the same time, dealers who intentionally violated the check system and the Act could not avoid liability by hiding behind arguments that the buyer's actions alone caused harm.

In addition, phone records of called-in checks or computer records of accessed database material would provide the information necessary to police dealers' actions. Thus, one of the key benefits to such a system would rest in its certainty. In addition to certainty in policing dealer actions, the system would allow for certainty on the part of the dealers themselves. The proposed system would relieve the business uncertainty that critics berate in the current system. Conscientious dealers

would face no possibility of liability and could confidently make sales to qualified purchasers.

Such regulation of the legal gun trade may seem intrusive to some observers. However, the uniquely deadly character of firearms coupled with the severity of harm that springs from guns held in the wrong hands creates a special need for tighter regulation. More important than administrative policy or business certainty, though, is the prevention of harm from sales to unqualified buyers.

Guns undoubtedly turn deadly in the hands of qualified buyers. And the Act's exclusion of minors, felons and mental incompetents from the qualified purchaser population surely proves underinclusive in its recognition of dangerous persons. However, the fact that tighter regulation cannot prevent all dangerous gun sales does not take away from the fact that tighter regulation could prevent more dangerous sales than the current system prevents.

#### *C. Nicholas*

The unfortunate power of today's gun culture and the sometimes precarious mental stability of qualified gun buyers points to a reality of continued gun violence regardless of revised regulation. Yet the severity of harm — namely death — that accompanies gun violence arguably thrusts upon those dealers entrusted with enforcement of the Gun Control Act a duty to avoid prohibited sales. However, current case law abandons dealers by giving them no clear guidelines concerning proper behavior under the Act. The current case law simply leaves dealers guessing about their possible duties to train employees or observe customers.

Optimism alone allows the prediction that a system of onsite checks and stricter liability will prevent a significant number of deaths and injuries. Reality, however, requires a less cheerful analysis of how the proposed system could prevent harm. Take, for example, Nicholas.

#### *D. Nicholas and His Gun Under the Proposed System*

Perhaps the mere existence of an onsite check system would instill in dealers a sharper sense of responsibility. Perhaps. And if the former police officer who let Nicholas carry a semi-automatic weapon out of Guns Unlimited in 1988 had felt the chill of hesitation that a stricter system could create, Nicholas' schoolhouse shooting spree might have been aborted.

After all, the onsite check system and accompanying certainty of liability for violations arguably would stimulate dealer awareness of the Act's provisions. The check, in addition, would emphasize a need for and an expectation of compliance with the Act. Nonetheless, this scenario smacks of unadulterated optimism. For Nicholas' cousin, the formal buyer, qualified as a legal buyer under the Act.

Accordingly, the question arises as to whether the proposed system proves too narrowly tailored to protect citizens from such straw-man purchases. Fortunately, criminal statutes can provide an answer, as Nicholas' cousin learned immediately after the shootings. Federal agents arrested him for making the straw-man purchase. The cousin spent thirteen months in prison for buying the gun. Thus, while the



proposed system neglects to directly address the straw-man issue, criminal codes can, and do, provide the necessary deterrence and punishment for such purchases.

The power and intrigue of America's gun culture caught Nicholas in its trap. Nicholas wanted a gun. He wanted that gun to come from Guns Unlimited. Of course, even if there were no Guns Unlimited, Nicholas would have wanted a gun. The store hardly bore responsibility for Nicholas' love for guns.

Yet Guns Unlimited played its part in the intrigue. The trip took Nicholas and his cousin nearly an hour, but it was the store of choice. Nicholas raved about the Cobray on the way. "Man," he said to his cousin, "you've got to see that; it's a nice gun."

For Nicholas, the intrigue of the gun culture erupted into a deadly day of senseless horror. His cousin and a federally licensed firearms dealer did him a great disservice by handing over the means to that deadly end. However, the individual dealers who work within the system are, perhaps, only as strong as the system itself.

If the strength of dealer responsibility truly rests in the tools of enforcement the Act provides them, the ATF has done dealers a great disservice as well. The Act's prohibitions on sales mean nothing without adequate means of enforcement. The current system arguably fails to provide those means with Form 4473 standing as the sole enforcement tool of the Act.

To argue that the proposed system would have spared Karen Farley her life denies the reality of straw-man and illegal purchases. Nonetheless, the proposed system addresses the aftermath of improper sales as well. The straw-man purchase complicates Nicholas' case. But regardless of whether the proposed system would have provided the Farley family with a monetary remedy, it would undoubtedly have given them a sense of certainty and finality the current system leaves them wanting.

If the straw-man sale constituted a sale to a minor in violation of the Act, Guns Unlimited would be liable under the proposed system. Thus, while the straw-man issue remains, the matters to be litigated dwindle to this issue alone. Under the proposed system, the Farleys would not face the task of proving unlawful sales to be negligent sales. The Farleys would, likewise, not have to face the task of persuading the court on policy issues.

### *IX. Conclusion*

If the proposed system fails in its attempt to prevent harm, at least it can ease the uncertainty of recovery of damages when dealers act irresponsibly. For if the law could not dampen Nicholas' infatuation with guns, it could have, if nothing else, spared Karen Farley's family the pain of years of uncertain litigation.

Although legislators can use gun control and civil liability in a seemingly feeble effort to curb gun violence, there exists a sometimes forgotten truth about crime. Guns are merely a symptom. For, as surely as guns increase the danger of crime, people lie at the heart of America's gun culture. Thus, gun control dooms itself to failure if it aspires to singlehandedly reduce crime because it attacks only a symptom. It is the young gun carriers like Nicholas who need our greatest resources

and most urgent attention. Their problems and temptations make gun control issues look easy.

According to Nicholas, his unnatural love for guns and his shooting spree were tied to the racial intolerance of his mostly white classmates — an intolerance that isolated him.<sup>316</sup> Nicholas' story hints at the deeper roots of America's violent ways. It is only from exploring these tangled roots that the gun culture can be understood and attacked. Still, some symptoms deserve treatment. And handguns are a telling symptom of violence that Americans have come to tolerate and even admire.

*Jacqueline Ballinger*

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316. Larson, *supra* note 1, at 75.

